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DIVISION II
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STATE OF WASHINGTON
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NO. 56121-2
COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

DEBORAH OSBORNE,

Appellant,

vs.

THADDEUS MARTIN,

Respondent.

APPELLANT'S REPLY BRIEF

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I. REPLY ARGUMENT

A. Standard of Review

The standard of review for an order granting summary judgment is de novo, considering the facts and the inferences from the facts, in the light most favorable to the nonmoving party. *Loeffelholz v. University of Washington* (2012) 175 Wash.2d 264, 285 P.3d 854.

“Summary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable jury could return a verdict in its favor.” *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995).

This case is on Appeal because the Superior Court granted an order for summary judgment without following procedural due process of law. A Fed. R. Civ. P. 60(b) motion can only be brought after a final judgment or order; interlocutory orders are insufficient to trigger a Rule 60(b) motion. *See Connors v. Inquique U.S.L.L.C.*, 2005 WL 3007127, at *7 (W.D. Wash. Nov. 9, 2005) (stating that Rule 60(b)’s Advisory Committee Notes clarifying that the adjective ‘final’ applies not only to ‘judgment,’ but to ‘order’ and ‘proceeding’ as well.)

The court erred to comply with the Superior Court's directive to ensure a timely and impartial resolution to a legal dispute of parties. There was no hearing on the Breach of Contract case and the trial court did not engage with parties to schedule pretrial conferences to allow the parties to work towards a resolution of dispute to gain a comprehensive review of the identifiable issues of material fact and to simplify the issues and eliminate frivolous claims or defenses.

The motion was improper and interfered with dates set by the district court for the Breach of Contract case filed March 18, 2021, and scheduled for hearing on February 17, 2022.

Osborne argues, the court had a judicial responsibility to preside over the case with fairness and impartially to ensure dates set by the district court were accomplished without causing delays; but he did not. Throughout Martin's response he argues the "Breach of Contract" claim was a Malpractice claim, if the court had complied with the district court to resolve this issue; and all of the pending issues pertaining to this case, this would have been settled. CP 90, Exhibit 5.

There are triable issues of fact and granting of the motion for summary judgment was an abuse of discretion by the court.

Avila v. Standard Oil Co. (1985) 167 Cal.App. 3441, 446.

Martin filed the improper motion for summary judgment on May 11, 2021, without filing any pleadings or evidence identifying those portions of materials in the record that show the absence of a genuine issue of material fact, pursuant to Civil Rule 56(c). The improper motion interfered with Osborne's Confirmation of Joinder of Parties, Claims and Defense which was set by the district court for "July 16, 2021".

Osborne responded in Opposition to Martin's Motion for summary judgment on July 6, 2021, and Martin's reply was filed two days later; on July 8, 2021, and again Martin did not identify those portion of the pleadings, the discovery and disclosure materials on file, and any affidavits that show the absence of a genuine issue of material fact.

The court erred to deny Martin's motion and it immediately interfered with the Breach of Contract case; so in keeping with dates set by the district court for the Breach of Contract, Osborne filed the Confirmation of Joinder of Parties, Claims

and Defense on July 14, 2021, and this time Martin simply did not respond.

If the summary judgment had been proper, the party seeking summary dismissal of the case “bears the initial responsibility of informing the district court of the basis for its motion”

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) and identifying those portions of “the pleadings, the discovery and disclosure materials on file, and any affidavits” that show the absence of a genuine issue of material fact (Fed. R. Civ. P. 56(c)).

Once the moving party has satisfied its burden, it is entitled to summary judgment if the nonmoving party fails to designate “specific facts showing that there is a genuine issue for trial.” *Celotex Corp.*, 477 U.S. at 324.

Summary judgment procedure is not catchpenny contrivance, to take unwary litigants into its toils and deprive them of trial; it is liberal measure, liberally designed for arriving at truth, and its purpose is not to cut litigants off from their right to trial by jury if they really have evidence which they will offer at trial, but it

is to carefully test this point out, in advance of trial, by inquiring and determining whether such evidence exists.

Preston v. Duncan (1960) 55 Wash.2d 678, 349 P.2d 605.

The court failed to set forth Osborne triable issues of material fact for trial, and quickly granted an improper summary judgment without following due process of law.

“The mere existence of a scintilla of evidence in support of the non-moving party’s position is not sufficient,” and factual disputes whose resolution would not affect the outcome of the suit are irrelevant to the consideration of a motion for summary judgment. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In other words, “Summary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonably jury could return a verdict in its favor.” *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995).

“Only when the defendant has satisfied this burden does the burden shift and does the Court have to determine whether the

plaintiff has demonstrated the existence of a triable issue of material fact.” *Pisaro*, 42 Cal.App.4th at 1602.

B. Osborne’s Breach of Contract Meets the six-year Statute of Limitations 4.16.040

Osborne maintains that when a contract is signed, it is legally binding. Failure to live up to the contract’s requirement is a Breach of Contract. In Washington State, written contract disputes have a statute of limitations of six-years, which applies to any liability, “express or implied arising out of a written agreement” RCW 4.16.040.

The four elements of a Breach of Contract claims are (1) the existence of a valid contract; (2) performance by the plaintiff or some justification for nonperformance; (3) failure to perform the contract by the defendant; and (4) damages as a result of the breach. *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992).

Osborne maintains that Martin breached his contract to perform to the terms of the agreement that was executed to represent her discrimination and retaliation claims against The Boeing Company.

(a) A lawyer shall, (1) promptly inform the client of any decision of circumstance with respect to which the client's informed consent, as defined in Rule 1.0A(e), is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished, (3) keep the client reasonably informed about the status of the matter, (4) promptly comply with reasonable requests for information; and (5) consult the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decision regarding the representation."

RPC 1.4.

Judge Lasnik denied Martin's Motion to Continue Trial and Related Dates. Martin failed to demonstrate diligence to comply with dates set by the district court which precluded him from knowing, establishing and factually developing Osborne's discrimination and retaliation claims. Martin breached his contract to perform his duty to represent Osborne's discrimination and retaliation claims. Martin did not contact Boeing's internal ADR and EEO systems to address the

discriminatory and retaliation claims perpetrated by her management. Martin did not contact any of Osborne's witnesses for depositions, or proffound any Interrogatives and Request for Admission to Boeing to be answered by defendants in order to clarify matters of fact to develop Osborne's claims with direct evidence, or conduct other discovery for production; and all of which were imperative for pretrial.

Judge Lasnik noted "It appears that the motion is prompted by the need to take discovery after the discovery period is closed rather than the fear of a potential conflict that may arise three months from now."

C. The Trial Court Did Not Provide the Parties with Due Process of Law

Osborne maintains the trial court deprived her U.S. Constitutional Due Process, Fifth and Fourteenth Amendment Rights to a fair hearing. The trial court failed to comply with the Superior Court's directive to ensure a timely and impartial resolution to a legal dispute of parties. There was no hearing on the Breach of Contract and no hearing on the Summary Judgment to know the court's findings and conclusion for

granting the improper Summary Judgment. The party seeking summary dismissal of the case “bears the initial responsibility of informing the district court of the basis for its motion”

Celotex v. Corp. v. Catrett, 477 U.S. 317, 323 (1986).

Martin had no pleadings or evidence identifying those portions of materials in the record that show the absence of a genuine issue of material fact.

The trial court failed to demonstrate diligence to comply with dates set by the district court for the Breach of Contract case and then negated due process of law to have a hearing and prepare for trial.

The court failed to comply with CR 16, to engage with parties to schedule pretrial conferences; and to require reports of the identifiable issues; to eliminate wasteful activities; and to improve the quality of the trial through more thorough preparation; and facilitating settlement.

There is no documentation in this case identifying the parties’ issues or any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after

information is produced, including agreements reached under Federal Rule of Evidence 502.

To be specific, Osborne's Breach of Contract case was scheduled for hearing on February 17, 2022, when the court obstructed the case and allowed an improper Summary Judgment to be scheduled for hearing on July 16, 2021, the same date set by the district court for the Confirmation of Joinder of Parties, Claims and Defenses. The motion was improper; there was no final judgment, order, or proceeding. The improper motion interfered with the district court's schedule to include The Boeing Company, a third-party defendant to the controversy. CP 319.

There were no pretrial conferences to allow the parties to work towards a resolution of dispute and to simplify the issues for the court to gain a comprehensive review of the identifiable issues for the purposes of improving the quality of the trial through a more thorough preparation for attorneys and any unrepresented parties.

Judge Rumbaugh deprived Osborne of constitutional due process to a fair hearing of the Breach of Contract case and

failed to set forth triable issues of material fact before a trial court and jury as demanded. CP 320 – 321.

“A fair trial in a fair tribunal is a basic requirement of due process”. Murchison, *349 U.S. 133, 136 (1955)*.

The judge in this case served as a “one-man grand jury”. This was a violation of the Due Process Clause of the Fourteenth Amendment, Pp. 349 U.S. 133-139.

Both statute and case law agree that due process is denied whenever bias taints an administrative proceeding.

Rule 60(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party.

1. Martin’s Motion for Summary Judgment was Improper, and not in compliance with CR 60(b)

Osborne maintains the motion was improper; there was no final judgment or order.

2. The Trial Court’s order for Summary Judgment was Improper, and not in compliance with CR 60(b)

On July 8, 2021, the Pierce County Superior Court emergency order #20-04, related to COVID-19, was lifted and

the Pierce County Superior Court Mask and Social Distance Guidelines were made effective.

On July 14, 2021, at 9:00 a.m., Osborne emailed the court's Judicial Assistant and requested an in-person hearing of the improper Summary Judgment scheduled for July 16, 2021, at 9:00 a.m., in according with Mask and Social Distance guidelines. All parties were included in the email.

Judge Rumbaugh did not respond to Osborne's request and gave no reason for denying the in-person or option to utilize Zoom Technology hearing.

On July 16, 2021, at 8:25 a.m., the Judicial Assistant advised that Judge Rumbaugh would be deciding the improper motion on the pleadings.

“Judge or Commissioner courtroom protocol is up to the individual Judge or Commissioner. The Executive Committee has approved all judicial staff and court participants to be unmasked if fully vaccinated. Court participants other than jurors will fall under the Pierce County Executive's guidance for masking in that if someone is not masked, they are assumed to be vaccinated. There is no social distancing requirements in the courtrooms for judicial staff or court participants if allowed by judge/ commissioner. If you have questions about

individual courtroom procedures, please ask the judicial assistant or courtroom clerk.”

Osborne argues (with emphasis) that Judge Rumbaugh knew the motion was improper, and he had no intentions of having a hearing on July 16, 2021 at 9:00 a.m., for a motion he knew obstructed dates set by the district court for the Breach of Contract case.

Judge Elizabeth Martin knew the motion for Summary Judgment was improper when Martin filed it on May 11, 2021, about two months before it was reassigned to Judge Rumbaugh, but instead of denying the improper motion, Judge Elizabeth Martin allowed it to obstruct the Breach of Contract case. CP 30.

A Fed. R. Civ. P. 60(b) motion can only be brought after a final judgment or order; interlocutory orders are insufficient to trigger a Rule (60) motion. See *Connors v. Inquique U.S.L.L.C.* 2005 WL 3007127, at *7 (W.D. Wash. Nov 9, 2005) (stating that Rule 60(b)’s “Advisory Committee Notes clarifying that the adjective ‘final’

applies not only to ‘judgment,’ but to ‘order’ and ‘proceeding’ as well.”).

If the motion had been proper, CR56(c) gives in part that “[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatives, and admissions on file, together or with affidavits, if any show there is no genuine issues as to material fact and that the moving party is entitled to a judgment as a matter of law.”

Once the moving party has satisfied its burden, it is entitled to summary judgment if the nonmoving party fails to designate “specific facts showing that there is a genuine issue for trial.”

Celotex Corp., 477 U.S. at 324. The Court will “view the evidence in the light most favorably to the nonmoving party...and draw all reasonable inferences in that party’s favor.” *Krechman v. Cnty of Riverside*, 723 F.3d 1104, 1109 (9th Cir. 2013) (internal quotations omitted). Although the Court must reverse for the jury genuine issues regarding credibility, the weight of the evidence, and legitimate inferences, the “mere existence of a scintilla of evidence of evidence in support of the [nonmoving party’s] position will be

insufficient” to avoid judgment. *Anderson v. Liberty Lobby, Inc.* 477 U.S, 242, 252 (1986). Factual disputes whose resolution would not affect the outcome of the suit are irrelevant to the consideration of a motion for summary judgment. *S. Cal. Darts Ass’n v. Zaffina*, 762 F.3d 921, 925 (9th Cir. 2010).

D. The Trial Court Judge Had a Duty to Recuse Himself From the “Breach of Contract” Case for Having a Personal Bias and Demonstrating Unfairness and Partiality

Osborne argues (with emphasis) the trial court had a judicial responsibility to preside over the Breach of Contract case with fairness and impartially. RCW 35.20.180

Judge Rumbaugh should have recused himself because he failed to demonstrate diligence to comply with the dates set by the district court for the Breach of Contract compliant.

Judge Rumbaugh should have recused himself because he deprived Osborne of a requirement that a legal matter be resolved according to the established rules and principles, and that individuals be treated fairly.

Judge Rumbaugh should have recused himself because he violated Osborne's U.S. Constitutional, Fifth and Fourteenth Amendment Rights to a fair hearing of the Breach of Contract case set by the district court for February 17, 2022.

Judge Rumbaugh should have rescued himself because he obstructed the Breach of Contract case and ruled on an improper Summary Judgment.

On July 13, 2021, Judge Rumbaugh was assigned to the Breach of Contract case, with a hearing scheduled for a Summary Judgment on July 16, 2021; he knew the arrangement was to undermine Osborne for a personal bias for Thaddeus Martin.

Judge Rumbaugh because the motion was improper.

The hearing for the motion was set for July 16, 2021, the same day as the Confirmation of Joinder of Parties, Claims and Defenses, was due, set by the district court for the Breach of Contract case. The court knew the Joinder included all of Osborne's Claims and Defenses. Martin failed to file a response with answers to the Joinder of Parties, Claims and Defenses, which meant he was in default and the court did not enter a default judgment against him.

The hearing scheduled for July 16, 2021, was hardly enough time for a trial court to resolve a matter of dispute when the Breach of Contract case had not been ruled on, it was in its first stages. The case was filed on March 18, 2021, with dates set by the district court for activities to be completed for a hearing on February 17, 2022.

Judge Rumbaugh obstructed the case schedule to allow an improper Summary Judgment with no pleadings or evidence to be granted.

If the motion had been proper, CR56(c) gives in part that “[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatives, and admissions on file, together or with affidavits, if any show there is no genuine issues as to material fact and that the moving party is entitled to a judgment as a matter of law.”

Summary Judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable jury could return a verdict in its favor.” *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995).

Judge Rumbaugh should have rescued himself when Osborne filed a Request for Reconsiderations and filed a request for a New Judge.

Judge Rumbaugh knew the dates set by district court were not for a Summary Judgment but rather a Breach of Contract. Judge Rumbaugh should have recused himself because he deviated from the Superior Courts directive to ensure a timely and impartial resolution to a legal dispute of parties in a Breach of Contract case.

On July 22, 2021, Judge Rumbaugh made a ruling without stating on the record how his decision was made in granting the order; since he had no pleadings or evidence to support his ruling. Judge Rumbaugh's ruling stated he "thoroughly reviewed the pleadings" unlike his other cases he provided findings and conclusions, pursuant to 52(a). CP 322 – 323.

There was no hearing, no Transcription, no Verbatim Report of Proceedings from a Court Reporter(s)/Transcriptionist(s) to make arrangements for this Appeal. The court did not make any specific Findings of fact and Conclusions of law, pursuant to Civil Rule 52(a).

Osborne argues that Judge Rumbaugh demonstrated unfairness and partiality and abused his position. Osborne triable issues of fact were not set forth for a trial.

There are triable issues of fact and granting of the motion for summary judgment was an abuse of discretion by the court.

Avila v. Standard Oil Co., (1985) 167 Cal.App. 3d 441, 446.

Judge Rumbaugh abused his position because he provided a personal bias to Martin, when Martin had not met his burden.

Summary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable jury could return a verdict in its favor.” *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995).

“A fair trial in a fair tribunal is a basic requirement of due process”. *Murchison*, 349 U.S. 133, 136 (1995).

III. CONCLUSION

This Court should reverse and remand the trial court’s improper order for summary judgment with prejudice, because (1) the motion was improper, and can only be brought after a final judgment, order, or proceeding, and (2) Osborne was deprived of U.S. Constitutional Due Process, Fifth and

Fourteenth Amendment Rights to a hearing and discovery of the case established by the district court for the “Breach of Contract” Complaint, scheduled for February 17, 2022, and (3) The court allowed an improper summary judgment to interfere with the proceedings scheduled for the “Breach of Contract” case and without having a hearing on the motion and without a jury trial (4) Martin did not satisfy his burden to inform the district court of the basis for its motion, he did not identify those portions of “the pleadings, the discovery and disclosure materials on file, and any affidavits” that show the absence of a genuine issue of material fact, and (5) the trial court did not have any basis for its order granting in granting the improper summary judgment; no pleadings and evidence identifying those portions of “the pleadings, the discovery and disclosure materials on file, and any affidavits” that show the absence of a genuine issue of material fact, and (6) the trial court did not comply with the court’s directive to resolve the disputed issues, and (7) the trial court did not file any specific Findings of fact and Conclusions of the law, and (8) the trial court did not demonstrated fairness and diligence to comply with the dates

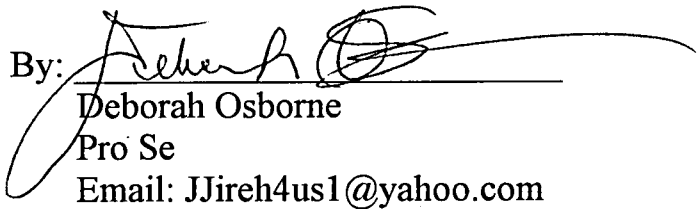
set by the district court, and (9) the trial court had a duty to disqualify himself from the case for having a personal bias and demonstrating unfairness and partiality.

For all of the foregoing reasons, Osborne respectfully requests that this Court reverse and remand the trial court's order for the improper summary judgment.

RAP 18.17 CERTIFICATION

I certify that this **APPELLANT REPLY BRIEF** contains 3,732 words (excluding words contained in appendices, title sheet, table of contents, table of authorities, certificate of compliance, certificate of service, signature blocks, and pictorial images) in compliance with RAP 18.17.

DATED this 12th day of August, 2022.

By: 
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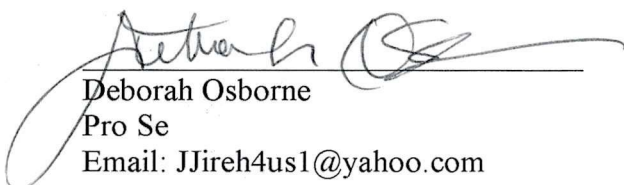
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CERTIFICATE OF SERVICE

The undersigned hereby certifies under the penalty of perjury under the laws of the State of Washington, that a copy of the foregoing APPELLANT'S REPLY BRIEF was served on the date given below, to the individuals named in the manner indicated:

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